Award No. 7350
Docket No. CL-7411

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

MIDLAND VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway Clerks that the Carrier violated the Clerks' Agreement at the Mechanical & Store Department, Muskogee, Oklahoma, beginning in January 1953, when,

(a) It arbitrarily and unilaterally began piece-mealing out, item by item, the work of ordering, receiving, issuing and handling of store material including stationery to employes not covered by the Agreement, Officials, employes excepted from the Agreement and employes in other seniority districts, and on March 12, 1953 abolished the position of Clerk held by Mr. Leo C. Lyle and on November 9, 1953 abolished the position of Clerk held by Mr. W. T. Patrick, and,

(b) That Carrier shall now be required to restore to the employes in the Mechanical & Store Department seniority district all the work in connection with ordering, receiving, issuing and handling of this material and stationery, and,

(c) That Mr. J. F. Toney shall be compensated for the difference in his former rate of pay as Clerk and that of Store Helper, and that Mr. Leo C, Lyle, who was displaced by Mr. Patrick, shall be compensated at the rate of his former position of Clerk, for each day so long as this violation continues, and,

(d) That all other employes adversely affected by action of the Carrier shall be compensated for all wage loss sustained.

EMPLOYES' STATEMENT OF FACTS: The Carrier maintains at Muskogee, Oklahoma a Store Department which for all practical purposes is the General Store inasmuch as it is the only Store Department on the railroad. The General Offices of the railroad are also located in Muskogee although about a mile from the Mechanical & Store Department. The Store Department supplies materials and stationery not only to the various shop departments and General Offices but to Agents, Section Foremen, outside mechanical points, Linemen, and all others that need materials and stationery and has done so for many years. In addition to supplying the Midland Valley Railroad, the Muskogee Store Department also supplies the Kansas, Oklahoma

work incident to the accounting continues to be performed by the Store Department forces in the same manner as heretofore.

It is the position of the carrier that it has established that the arranging for the purchasing of stationery by the various departments, as shown by Exhibits A and B, and keeping the entire stock in the department, the Store Department not having any connection therewith, does not constitute the removal of work from Store Department forces, as such forces have not and do not now perform such work. In view thereof, although it is a type of work which the clerical forces at the Store Department could perform, it does not fall within the scope of the agreement but it is excepted therefrom. It goes without saying that when a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforceable to the same extent as the provisions of the contract itself. The foregoing principle is applicable in the instant case with reference to the handling of stationery by the various departments.

We now turn to the handling of car materials. Certainly the carrier is within its rights to charge out from store stock and remove the material to a point where readily available. As previously stated, there is involved only a change in location, all other work incident thereto remaining the same as heretofore.

The petitioners' allegations are not supported by the evidence.

The issue in this case is briefly summarized by the carrier as follows:

(a) That work coming within the scope of the current Clerks' Agreement has not been removed.

(b) That under the circumstances there are no schedule provisions supporting the claims as made. Instead, the claim as made has as its basis mere allegations.

(c) That the clerical positions which were abolished on March 12, 1953, and November 9, 1953, were not the result of improper handling on the part of the carrier, instead such positions were no longer needed to meet the service requirements under the conditions which existed and therefore were abolished in the usual and customary manner.

Since this is an ex parte case, this submission has been prepared without seeing the employes' statement of facts or their contention as filed with the Board, and the carrier reserves the right to make a further statement when it is informed of the contention of the petitioner, and requested an opportunity to answer in writing any allegation not answered by this submission.

Carrier's Exhibits A and B are attached hereto.

All data submitted herewith in support of the Carrier's position has been presented to the employes or their duly authorized representative and is hereby made a part of the matter in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: There is in evidence an Agreement between the parties bearing an effective date of January 1, 1953. Otherwise, we have mostly charges and counter-charges that go to make up a docket that is burdensome, duplicitous, and in disorder.

The dispute arises in the Store Department of the Carrier's Mechanical and Store Department at Muskogee. A dispute from the same department was before us in another docket, Award No. 7349.

Employes claim that Carrier is piece-mealing out, item by item, to those not covered by the Agreement, the work of ordering, receiving, issuing and handling store material.

No greater aggravation exists than removal of work from the scope of Agreement, and it burdens the Board enough to handle those disputes when issues are clearly stated and facts are not controverted.

The submissions now before us fall far short of demonstrating a good faith effort to settle the dispute on the property, or compliance with the joint responsibility for furnishing the Board with a "full statement of the facts and all supporting data bearing upon the disputes" in keeping with the spirit and intent of Title I, Sec. 2, Second, and Sec. 3, First (i) Railway Labor Act (U. S. C. Title 45 Chapter 8), as amended, same being an Act to provide for the prompt disposition of disputes between Carriers and their Employes and for other purposes.

The Statement of Claim amounts to no more than the allegation that the contract has been or is being violated. It is not evidence. The charge, as laid, must be supported by fact. On the theory that the one affirmatively charging a violation is the moving party, and, therefore, should be in possession of the essential facts to support the charge before making it, this Division of the Board is committed to the so-called "burden of proof" doctrine. See Awards 3469, 5345, 5962, 6829, 6839.

The foregoing doctrine at times has been much abused and maligned account failure to recognize a first duty of the parties to decide in conferences, if possible, all disputes between them growing out of the interpretation and application of their Agreement; and, before coming to the Board, it is expected that each will submit to the other that data relied upon to support its position, and, on doing so, the Board expects them to agree on controlling facts without regard to whether the submission is joint or ex parte. See Section 2, Second, Railway Labor Act, supra, and the Board's Rules of Procedure.

Moreover, the "burden of proof" doctrine and supporting Awards are under constant attack by lay forces that must come to this Board for settlement of disputes. It is argued, with more than a little justification, that, this Board, while a creature of law, is not a court of record and Congress never intended it as such; that if the rules of evidence, pleadings, and other legal precepts were to govern in these disputes, the courts provide a proper forum and no need for this agency existed. Further, it is persuasively argued that Congress would have given us the plenary power to marshal evidence and take testimony, if it were intended we should do more than interpret and apply Agreements according to the clear purpose and intent of language used by the contracting parties.

Therefore, without regard to the quantum of proof brought forward by the submission of either party to this docket, and, despite Carrier's claim that the burden of proof has not been met, we shall undertake to resolve the dispute by ferreting from the record such facts as we can find and use as a basis for interpreting and construing the Agreement that is in evidence.

These Agreements find root in law. Section 2, "General Duties", Railway Labor Act, supra, in part provides:

> "First.—It shall be the duty of all carriers, their officers, agents, and employes to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employes thereof."

The Agreements are made in a setting unlike anything known to usual contract making. Collective bargaining is closely akin to the process of legislating and out of that process comes rules that govern employer and employe alike, such rules being commonly known and referred to as Rules of Agreement. Nevertheless, these Rules of Agreement take on many of the attributes of contract and always have been held to be enforceable as such.

The subject matter of the contract is work. The contracting parties are Carrier's Management Representatives on the one hand and the duly designated Representative of its employes on the other. The authority of both is recognized by law and they make their agreements within scope of the law. Mutual covenants, responsibilities, and obligations serve as consideration.

Neither contracting party is required by law to give up any prerogative that is inherent in the position each occupies, but, if through the powers of persuasion, or such economic forces as may be effectively and legitimately employed, a share is given by one to the other of its formerly unquestioned authority, it should not thereafter complain when it finds that authority thus fettered.

The subject matter of the contract being work the first determination to be made in making the contract is the class of work that is to be let to a given craft of employes and next the conditions under which it is to be let and is to be performed. The Carrier has need for staffing its operations with positions, variable in number and subject to change in accordance with work load and requirements of the service. Those positions are to be worked by employes who hire out in the Carrier's service, pursuant to the terms of a collective agreement, not by individual contracts of hire. The employes next must be assigned duties in accordance with classified positions and thus the work is organized and assigned along craft lines.

The Employe Representative always seeks the right to perform the Carrier's work that traditionally falls in the class of service that its craft has, by usage, custom and practice, performed for those who have found need for such services, and, thereupon, it lays claim to such work in negotiations with Management Representatives. Out of the Carrier's needs, and the demands of its employes who are banded together in crafts, comes what usually is one of the first rules incorporated in the Agreement and commonly referred to as the "scope rule" stated simply, the "scope rule" has the effect of reserving to enumerated positions the customary work of the craft.

The "scope rule" appears in different forms and is expressed in a variety of language, but always without attempt to detail the work embraced therein. Many just list positions which serve as a skeleton to which work is welded by usage, custom and practice but, even in connection with those rules, it is futile to argue that job duties and responsibilities are not contemplated thereby, else there would be no basis for evaluating the worth of the position for determining rates of pay, also a subject for bargaining, and the wage schedule would reflect a wage common to all positions.

A basis for filling the positions by employes eligible and keeping same constantly filled in accordance with need for performing the work of the position, and for movement of employes among positions, is also a subject for bargaining. The most effective process so far devised in railroad employments is found in the seniority rules of the Agreement.

As the terms and conditions of the different employments are agreed upon, the parties undertake to reduce to writing rules that cover, briefly, concisely, and, succinctly, by using words that are mutually understood and acceptable. The words are to be interpreted so as to give effect to the mutual intention of the parties, as it existed at the time of contracting so far as the same is ascertainable. The words are always important, but it also helps to

look to the setting where the words were first used (collective bargaining) and then trace, if one can, the meaning of those words according to mutual acceptance. The words are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless it can be ascertained that such words have been used by the parties in a technical sense in accordance with a special meaning given to them by usage.

The separate Divisions of the Board have come to expect literal compliance with these Agreements and will not give aid or succor to either party that finds itself dissatisfied with the bargain it has made. The contracting parties have the duty to change their contract in conformity with law, without aid and assistance of the interpretative powers of the Board, such being the only authority vested in it by law. The justification for adhering to strict compliance is that we are constantly dealing with what amounts to an open end contract. That is to say, the Agreement usually is indefinite as to duration or term. When changes are found desirable by either party account dissatisfaction with its bargain, there exists a prompt, effective, and only escape, by agreement or operation of law. See Sec. 6, Railway Labor Act, supra.

For a well reasoned and judicious opinion as to the more important undertakings of these Agreements, what they mean, and how they operate, see Award No. 351 (First Div.), by the late Judge Swacker, who, at the time the Award was rendered, was assisting the Board as Referee. In that docket the dispute concerned, in part, the workers' right to perform all service embraced by the Agreement. In that regard, Judge Swacker said in part:

> "* * * To hold that the contract contemplated less than all of such services would leave it quite indefinite as to what, if any, portion of the service of the kind involved was subject to it. * * *"

In connection with a contention that the Carrier should have the right to place work within the scope of the Agreement and to take it out at will, Judge Swacker makes this pertinent observation:

> "Such a construction of the contract would make it a mere 'will, wish or want' contract or, that is, no contract at all."

Seldom does the Board feel the need for going to such great lengths in its opinions, as in this docket, to explain the obligations of contract and the purpose and intent of the law governing in these matters. It has been noted here, however, either a lack of understanding of mutual obligation or a purposeful shirking of duty. The parties should have resolved this dispute on the property if they could, but, being unable to do so, they would have served their purposes better by progressing claims that would have been more readily understandable. The great lengths to which we have gone serve also to explain why, on being presented with submissions like the one at issue, the Board usually sees enough substance to the dispute to warrant careful investigation of the record, and, if there is any evidence, no matter how slight, of a violation that violation will be pointed out to the parties.

Some of the difficulty encountered in connection with this docket of charges and counter-charges, and little evidence in support thereof, has been overcome by drawing fully upon able assistance given by Employe and Carrier representation on the Board. There has been careful briefing of the case and full discussion in Board conferences. No less than 68 awards have been cited and are relied upon. Many more have been cited and examined in discussing related dockets before us for decision from this same property, involving the same Organization, and in each of these dockets the matter in dispute relating to removal of work from the Agreement.

The controverted subject matter in this docket involves two clerk's positions that were in existence and worked by employes in the Store Depart-

ment prior to abolishment of said positions by Carrier. On March 12, 1953, the position of Clerk (Timekeeper) was abolished. The second Clerk position was abolished on November 9, 1953. Abolishment of the positions brought about displacement of employes who are aggrieved and who seek to be compensated for wage loss. There is present, also, the apparent belief on petitioner's part that, in event of a sustaining award, this proceedings will serve to recapture the work and likely bring about the re-establishment of abolished positions.

The Store Department furnishes certain items of material and stationery to the shop departments, agents, section foremen, and others. More about the Store operation will be found in a companion docket and the Board's Opinion in Award No. 7349. In that Opinion, the scope rule here at issue is discussed and the subject of abolishing positions is covered in some detail.

The dispute concerns a class of work that has to do with ordering, handling and the distribution of heavy track material, car materials, and stationery for use in other departments. Carrier's Management Officials, being of the opinion the Store Department is archaic and uneconomical, made certain changes in the manner of furnishing materials and supplies, at least some of which, as in the past, were used exclusively in and by a given department. The right to make these changes except by mutual consent of parties signatory to the Collective Agreement, depends upon whether there has been a removal of positions or work from the application of the rules, as the term "removal" is interpreted and construed by this Board.

It is nearly fatal to the claims that, after petitioner details the work that it says was removed from scope of the Agreement, it tells us that "prior to the abolishment of their positions, a part of the duties assigned to and performed by Mr. Toney and Mr. Lyle was the receiving, handling and issuing of materials from the Store Department".

We can only deal intelligently with claims that concern abolishment of positions by knowing the real impact that the removal of work has had upon the position. It helps considerably, therefore, to have the duties of the position clearly detailed and set forth in the record. In this docket, it adds to an already confused situation that in Award No. 6760, same property, same Mechanical and Store Department, a Clerk (Timekeeper) position was involved and at that time the incumbent was J. F. Toney, one of the claimants here.

Now the Carrier tells us, backed by ample proof in support of its statement, that, as a result of the decrease in the number of Mechanical Department employes, it was able to dispense with the Clerk (Timekeeper) position by turning the remaining work over to other clerical employes in the office.

This Board has long been on record that the work of a position need not entirely disappear before a position may be abolished, provided none of the work is assigned to or performed by others not covered by the Agreement. See Awards 439, 5641, 5664.

Accordingly, we see no basis for holding that the abolishment of the Clerk (Timekeeper) position amounts to a violation of contract.

The question of violation in connection with handling of heavy track material is disposed of in Award No. 7349.

In searching the docket for proof of other violations, we find the claim that is made to the work of handling car materials foreclosed by earlier Board Awards. Compare Awards 2334, 3216, 3431, 4939, 5391, 5397, 5507, 7081, 7188.

While we are in accord with the view that the scope rule in evidence is not subject to any such interpretation as that which involves "ebb and flow", we do not think the distinction is one consequence in connection with principles that are adhered to in the above cited Awards.

For instance the inclusion of the word "work" with "positions" in the language of the revised scope rule does not serve the Employes to any greater advantage than that which we have indicated. In sustaining Award 5397 the scope rule deals only with positions, but there the Board overruled Carrier's contention that work was not covered. Another reason for citing that Award here is account we see something also pertinent in the language of the Opinion, to-wit:

> "It appears from the record that Motive Power and Car Department employes help themselves to such stock as they may need from the old store building, and the roundhouse clerk, under the Agreement but in another district, orders and keeps a record of stock on hand among other duties assumed after and as a result of the abolishment of the position in question."

Because the work of ordering and keeping a record was being done in a separate seniority district after abolishment of a position, it was held the Agreement was violated, but, in connection with other handling, the Board observed:

> "We find nothing in conflict with the rules insofar as the procuring and handling of supplies by the using department is concerned in the instant case (helping themselves to such stock as they may need from the old store building). Clerks do not have the exclusive right to this work and where incidental and necessary to the work of others, it is permissible practice for the latter to act once custody is transferred."

It is undisputed in this docket that prior to January, 1953, all car material was ordered by the Storekeeper, but we find nothing of record to show there has been a change in the ordering of this material, except that having to do with the elimination of a perpetual inventory system and substituting therefor a more informal handling that has to do with the Car Foreman (who supervises the use of the material) passing a note to the Storekeeper when he notices the stock of any item getting low. A claim cannot be supported merely on the fact that the Car Foreman informed the Storekeeper how much material he would need, when the Storekeeper, now as in the past, orders the material and the Car Foreman, at most, performs the duty of seeing that the stock does not get below his needs. Awards 4939, 7188.

We further find from the record that when car material is received, the store employes check the material in as received, and deliver it to the Car Department where it is placed in locations by the Car Department employes. From this supply of materials the Car Department employes help themselves to such materials as they need. All work incident to ordering, accounting and delivering is being done by the Store Department forces as before. Car materials now are delivered directly to the Car Department, where they can be procured by the mechanics who use these materials in performance of their work, instead of same being checked out in small lots from the Store as needed. Award No. 5397.

On authority of the cited Awards we find no evidence of a removal of work, up to this point, as would conflict even with a scope rule such as we have here.

The handling of stationery is still another matter. We see little in the Carrier's defense to this part of the claim except it says the Employes are mistaken about the facts and offers proof to show that certain specific forms

in named departments are ordered, as in the past, through the Purchasing Department without the Store Department having any part in the transaction.

The one who charges a removal of the work has been employed in the Store Department for over 25 years and a part of his duties consist of handling stationery. We have it on authority of his statement that more is involved than the Carrier would have us believe. The Carrier refused to enter into a joint check of the work as repeatedly requested by the petitioner since the outset of this dispute and continuing up until its final submission to the Board. On the point at issue we credit the accuracy of petitioner's statement. See Awards 1256, 6361, 6657. In the first of these Awards we said:

> "Moreover, there is evidence in the record that the petitioner made several efforts to get the carrier to agree upon a joint check to determine the dispute, but carrier refused leaving the inference that the petitioner's position was correct; * * *"

We are not to be understood to say that carriers in every instance must consent to a joint check while a dispute is being progressed on the property. When we can get from the record enough in the way of undisputed facts for a decision, as here demonstrated in connection with other parts of this claim we do not expect more, but there is a calculated risk in the refusal to make a joint check as the cited Awards show.

Except as to those isolated instances as shown by Carrier's Exhibits "A" and "B", we see enough by way of a violation in connection with stationery handling for upholding what amounts to a protest, since, for reasons hereinafter stated, we cannot sustain the claims as stated.

No duty rests with the Board to search the record for a basis on which to allow monetary claims or to enforce other remedial action, and we never do so except for the possibility that in searching for the violation petitioner says is in evidence, the remedy is thereby made clear.

The nature of the instant claim is such, involving as it does a charge of piece-mealing out work, that it was readily apparent from the outset, more could not be accomplished here than to take the work in controversy, item by item, and trace the record for violation. We have done so at great expense of time and effort and the parties now should be able to adjust their remaining differences in conference.

We hold in this docket only that Carrier should not have removed the stationery work from the scope of the Agreement without the Employes' consent, and make no attempt to say what should result from their efforts to agree, but leave both free to bargain out their differences by employing whatever legitimate resources are at their command.

We do call it to the Carrier's attention, however, that it is not at liberty to continue in effect what we hold to be a change in working conditions without having first complied with the law for making such changes. Sec. 6, Railway Labor Act, Amended, supra.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated, but only to the extent set forth in the Opinion.

AWARD

Claims disposed of in accordance with the above Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 7th day of June, 1956.